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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT 76G)
106676 BY ARNIE MOHL)

FINAL
ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the December 4, 2000, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application For Beneficial Water Use Permit 76G 106676 BY ARNIE MOHL is hereby **DENIED**.


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements

with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 5th day of January, 2001.


Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 5th day of January, 2001.

Arnie Mohl
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Kalispell, MT 59901

Michael W Green
PO Box 797
Helena MT 59624

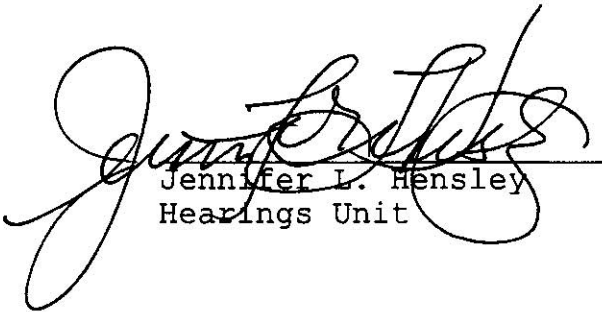
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Jennifer L. Hensley
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BEFORE THE DEPARTMENT OF
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OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT 76G)
106676 BY ARNIE MOHL)

PROPOSAL
FOR
DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on June 21, 2000, in Deer Lodge, Montana, to determine whether a beneficial water use permit should be issued to Arnie Mohl for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicant appeared at the hearing and by and through counsel, Michael W. Green. Ron McQuay, Manager of Windy Mountain Ranch (Mohl Ranch), and Jamen Shelley, former Manager of Windy Mountain Ranch, testified for the Applicant.

Objector Evered and Ramona McQueary were represented at the hearing by their son, Dan McQueary. Objector Mary and Richard Greany appeared in person. Pete McQueary and Dan McQueary were called to testify by Objector Greany.

Jim Beck, Agricultural Engineering Specialist with the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Applicant.

EXHIBITS

Applicant offered no exhibits for the record.

Objector offered 1 exhibit for the record. The Hearing Examiner accepts Objector's Exhibit 1.

Objector's Exhibit 1 is a copy of a Powell County Decree Number 215. Applicant objected to acceptance of this exhibit on the grounds of relevancy stating the decree is for periods outside the proposed period of use in the pending application. Applicant was granted time to review the decree and submit a brief in support of the objection. Applicant's objection is overruled. The Decree contains information regarding historic use of the existing rights on Peterson Creek.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

PRELIMINARY MATTERS

At the hearing Applicant amended the number of livestock to be watered from 1200 cow/calf pairs to 300 cow/calf pairs. The requested volume for livestock use has been adjusted to one-quarter of that requested.

Department staff received verbal information that Arnie Mohl is the successor of Roy and Wanda Prock in this application. The Department records as of the date of this order do not confirm Mr. Mohl is the successor to the application. Testimony at the hearing is that Arnie Mohl purchased Windy Mountain Ranch "lock, stock, and barrel" from Roy and Wanda Prock suggest that Arnie Mohl is the current owner on this application without a *DNRC WATER RIGHT OWNERSHIP UPDATE* form.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 76G-106676 in the name of and signed by Roy and Wanda Prock was filed with the Department on February 16, 1999. Arnie Mohl purchased Windy Mountain

Ranch from Roy and Wanda Prock April 1, 2000. Arnie Mohl is the owner of this application. (Department file, Department records, see Preliminary Matters [above])

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 1200 gallons per minute (hereafter gpm) up to 43.6 acre-feet of water per year from Peterson Creek at a point in the NW¹/₄NW¹/₄SW¹/₄ of Section 9, Township 6 North, Range 8 West, Powell County, Montana. The proposed means of diversion is an existing headgate and ditch. The proposed period of appropriation and period of use is October 1 to December 31, inclusive of each year.

The proposed use is 1200 gpm up to 1.3 acre-feet for stock. The proposed place of use is in the SE¹/₄SE¹/₄SE¹/₄, SE¹/₄SW¹/₄SE¹/₄ of Section 23, NW¹/₄SE¹/₄NE¹/₄, SW¹/₄SW¹/₄SE¹/₄, SE¹/₄NW¹/₄SW¹/₄, SW¹/₄SW¹/₄SW¹/₄ of Section 26, NE¹/₄NE¹/₄SE¹/₄ of Section 34, and NW¹/₄NW¹/₄NW¹/₄, SW¹/₄NE¹/₄NE¹/₄, SE¹/₄NW¹/₄NE¹/₄, SW¹/₄SW¹/₄NW¹/₄, NW¹/₄NE¹/₄SE¹/₄, SW¹/₄NE¹/₄SE¹/₄, NE¹/₄NW¹/₄SE¹/₄, SE¹/₄SE¹/₄SE¹/₄, Section 35, all in Township 6 North, Range 8 West, Powell County, Montana. In addition to stock tanks located in the above description, water will be diverted to seven off stream storage reservoirs, with a combined capacity of 28.2 acre-feet.

The reservoirs are located in the SE¹/₄SE¹/₄SE¹/₄ (0.6 acre-feet) of Section 23, NW¹/₄SE¹/₄NE¹/₄ (12.4 acre-feet) of Section 26, SW¹/₄NE¹/₄NE¹/₄ (10.9 acre-feet), SE¹/₄SE¹/₄SE¹/₄ (2.0 acre-feet), SW¹/₄NE¹/₄SE¹/₄ (0.1 acre-feet), NE¹/₄NW¹/₄SE¹/₄ (0.7 acre-feet), NW¹/₄NE¹/₄SE¹/₄ (1.5 acre-feet) of Section 35, all in Township 6 North, Range 8 West, Powell County, Montana. Seepage losses of 14.1 acre-feet are included in the total volume requested. (Department file)

4. Applicant has proven water is physically available. The record shows that on average years the requested flow is not typically

available. However, Applicant requests to divert only at times when flows exceed that necessary for downstream appropriators and during high runoff events in the period of use. There are times when precipitation events provide high flows which exceed current demands.

(Department file, testimony of Jim Beck, Dan M^cQueary)

5. Applicant has not proven water is legally available. Applicant relies on a design to leave 1.25 cubic feet per second (hereafter cfs) flow in Peterson Creek to meet downstream stock demands. Applicant estimated downstream stock demand at 1.25 cfs. There are times when 1.25 cfs does not provide adequate carriage water to downstream senior users. The record lacks information to establish an adequate by-pass flow adequate to meet downstream stock demands during the period of appropriation. (Department file, testimony of Jamen Shelley, Dan M^cQueary)

6. Applicant has not proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. There are flows during the proposed period of appropriation when Peterson Creek freezes solid at the downstream Objectors' instream stock diversion areas preventing reasonable stock use of the creek. Any reduction in stream flows above the Objectors' use would reduce the time stockwater is usable in Peterson Creek; thus, adversely affecting existing downstream stock rights.. The record lacks information showing the proposed 1.25 cfs by-pass flow is adequate to meet downstream stock demands during the period of diversion. (Department file, testimony of Dan M^cQueary, Richard Greany)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. The proposed diversion is an existing headgate, ditch, and reservoir

system. The existing system can divert to beneficial use without waste 224 gpm to 1200 gpm (20-107 miners inches). The existing headgate can be modified to pass a predetermined flow back to Peterson Creek. (Department file, testimony of Ron M^cQuay)

8. The proposal is an exception to the Upper Clark Fork River basin closure area. The Department may not process or grant applications for water use permits in the closure area. Exceptions to the closure include applications for stock use and to store water. (Department file, testimony of Jim Beck)

9. Applicant has proven the proposed use of water for stock is beneficial, and storage for stock is not a waste of water. The amount requested includes water for seepage and evaporation losses from the seven reservoirs. The amount requested is reasonable. (Department file, testimony of Jim Beck)

10. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. (Arnie Mohl testimony)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).

2. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Mont. Code Ann. § 85-2-312 (1999).

3. Applicant has not met the criteria for issuance of a beneficial water use permit. See Findings of Fact 5 and 6. Mont. Code Ann. §85-2-311 (1999)

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER


Application for Beneficial Water Use Permit 76G 106676 by Arnie Mohl is hereby **DENIED**.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the service of the proposal. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 4th day of December, 2000.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 5th day of December, 2000.

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John Dudis
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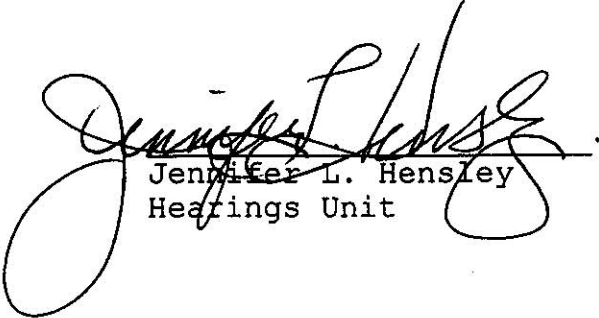
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